

From S. Stavropoul  
TO: R. Leiniger  
Re: Retrospective Application of RCRA  
Date: 2.22.80

Questions Presented



The first rule of statutory construction is that a retrospective operation will not be given to a statute which interferes with antecedent rights unless such be the unequivocal and inflexible import of the terms and the manifest intention of the legislative. Union Pacific R.R. Co. v. Laramie Stock Yards Co., 231 U.S. 190, 199, 34 S. Ct. 101, 102, 58 L. Ed. 179 (1913).

- 1) In terms of the above rule, what is meant by an antecedent right?
- 2) Does Reilly Tar have any antecedent rights which would be effected by the retroactive application of RCRA.
- 3) Notwithstanding the above rule of construction, is it possible for an interest in the publics' safety or health to be so compelling as to allow a retrospective application of a statute which interferes with antecedent rights?

Discussion

- 1) One Virginia court has defined an "antecedent" or "visited right" as a right so fixed that it is not dependent on any future act, contingency, or decision to make it more secure. Kennedy Coal Corp. v. Buckhorn Coal Corp., 140 Va. 37, 124 S. E. 482, 484 (1924).

Modern case law provides some examples of these rights. These examples include: rights established as a result of the entry of a default judgment Amoco Overseas Oil v. Compagnie Nationale Algerienne de Navigation, 459 F Supp, 1242, 1248 (S.D.N.Y. 1978); the rights to mortgage insurance and interest reduction payments from HUD after the village involved had already erected a building on the faith of that obligation, Southeast Chicago Commision v. Department of Housing and Urban Development, 488 F. 2d 1119 (7th Cir. 1973); a union's state law claim which had "matured" when the hospital with which they had a collective bargaining agreement refused to arbitrate, Hospital Employees Labor Program of Metropolitan Chicago V. Ridgeway Hospital, 570 F. 2d 167 (7th Cir. 1978). This court stressed the fact that retroactive application of the new statute would subject the hospital to "Unforeseen obligations." Id.

It would also be helpful to consider cases in which the court determined that there was no "antecedent right" and therefore no reason not to apply the statute retroactively.

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In Keith v. Volpe, 352 F. Supp. 1324 (C.D. Calif., 1972), design approval had been received for 3 out of 8 Segments of a proposed highway and 55.8% of the required land had already been purchased. Nevertheless, the court halted all work on the freeway project because the project had not yet reached the state of completion where the costs of abandoning or altering the proposed route would clearly outweigh the benefits therefrom.

The defendants in Don't Tear It Down, Inc. v. Washington, 399 F. Supp. 153, 156 (D.D.C., 1975), wanted to demolish part of a hotel they applied for and were granted a permit to carry out these plans before a moratorium went into effect banning such construction. The court said they must now comply with the moratorium, it being "clear that federal legislation can regulate future action in a way that interferes with rights previously requested. Id Keep in mind that no demolition or reconstruction had yet begun.

- 2) It is apparent that Reilly Tar's property rights are "antecedent". They have not only terminated their use of the land, but have also sold the parcel to another party. Using the definition of the Kennedy court, Reilly's property rights are no longer dependent on any future act or contingency. All of their actions involving the use of the land have already been completed. There is nothing in the planning stage, no project is currently under way.

The above cases illustrate that the courts will only find a non-antecedent right when an action or project is not yet completed. Even if only partially completed, the court may still choose not to interfere with a project because the costs of altering the proposal may outweigh the benefits which would result from such and alteration. Once a substantial change in circumstance has occurred in reliance on the law in effect at the time of the action, the right is an "antecedent" one.

However, one could possibly take the approach of the court in Koger v. Ball, 497 F. 2d 702 (4th Cir. 1974). Just as that court found that the government had no vested right to discriminate against its employees on the basis of race, so too Reilly Tar did not have a vested right in dumping waste in such a way that would pollute the areas' drinking water. This would eliminate the "antecedent right" and therefore any interference with "antecedent rights" which could be caused by a retrospective application of the statute.

- 3) Adams Nursing Home of Williamstown v. Mathews, 548 F. 2d 1080, 1081 (1st Cir., 1977) does provide another possible solution. Stating that not every law which upsets expectations is invalid, the court felt that the decision on whether to apply a statute retroactively should be based upon a balancing of the public interest in the retroactive rule and the private interests that are overturned by it.

Elaborating further, the court in Comtronics, Inc. v. Puerto Rico Telephone Co., 409 F. Supp. 800, 809 (D. Puerto Ric, 1975), begins its analysis of this question by pointing out that it is settled law that an inherent attribute of government is the police power to regulate business activity within its jurisdiction in furtherance

of the public interest and welfare of the legislation involved is within the legitimate sphere of legislation involved is within the legitimate sphere of legislative power and reasonably intended to promote the public health, safety, or general welfare, there is no violation of the due process clause irrespective of the magnitude of the loss that may occur as a result of its retrospective application.

This court felt that the police power is one of the initial powers of government; the limitation of which is precluded unless the power is arbitrarily exercised. This holds true even though its operation often cuts down property rights. The police power is thus capable of being exercised to regulate retroactively without offending due process. In short, a vested interest in existing conditions cannot be asserted against the proper exercise of the police powers.

Although legislation or regulations adopted pursuant thereto may have economic consequences which may be inconsistent with a party's reasonable expectations, such inconsistencies are not equivalent to unconstitutionality. The burden is on the one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way. Springdale Convalescent Center v. Mathews, 545 F. 2d 943, 957 (5th Cir. 1977).

It would be difficult to imagine a more compelling state interest than the protection of thousands of people from a deadly form of pollution. Though Reilly Tar would suffer some economic loss; using the balancing test proposed in the Adams case would clearly show that the interest in public, safety, far outweighs any rights Reilly may have. In addition under the Springdale test, it would be close to impossible for Reilly Tar to establish that the legislature had acted in an arbitrary and irrational way.

### Conclusion

A dual argument would seem to be the best approach, Beginning with the best approach. Beginning with the Koger v. Ball, supra, Nationale; an argument should be made stressing the lack of any antecedent right insofar as polluting drinking water is concerned. Because Reilly Tar had no vested right in dumping in such an irresponsible manner, there is no right which would be adversely effected by a retrospectible application of the statute.

Even the court determines that Reilly Tar did have an antecedent right which would be adversely effected by a retrospective application, the Adams and Comtronics cases have held that the legislature's police power allows the retrospective application of statutes even if antecedent rights are effected.

As long as the state can show that the public's health or safety was at stake, the court will not find the retrospective application unconstitutional. 006338